Sodalite Sdn Bhd & Ors v 1 Mont' Kiara and Kiara 2 Management Corp & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCvC-729–04 OF 2019
MOHD ARIEF JC
7 MAY 2021

Land Law — Strata title — Management corporation — Maintenance charges — Whether first defendant had power to apply different unit rates to calculate and to impose charges concerning maintenance charges and sinking fund contributions on parcel owners — Whether first defendant had power to transfer its funds to subsidiary management corporation — Strata Management Act 2013 s 60(3)

Statutory Interpretation — Construction of statutes — Intention of legislator — Whether first defendant had power to transfer its funds to subsidiary management corporation — Interpretation Acts 1948 and 1967 ss 40(1) & 95

The dispute in this case arose out of the mixed development known as 1 Mont Kiara Development ('the development') that was made of: (a) I-Zen Kiara II ('Kiara 2'); (b) Menara 1 MK; (c) Wisma Mont Kiara ('Wisma Kiara'); and (d) 1 Mont Kiara. The first defendant ie the management corporation ('MC') came into being under s 56 of the Strata Management Act 2013 ('the Act') and three separate subsidiary management corporation ('SMC') was set up following s 17A of the Strata Titles Act 1985. The three SMCs were Izen Kiara 2 SMC, Menara 1MK SMC and 1 Mont Kiara and Wisma Mont Kiara SMC. Because of a dispute as to the amount of maintenance charges and the sinking fund sums chargeable on the proprietors of Wisma Mont Kiara and 1 Mont Kiara, that was earlier imposed by the developer, Ireka Land Sdn Bhd, the then joint management body ('JMB'), the predecessor to MC, had retained the services of Burgess Rawson Management Sdn Bhd ('BRM'). BRM was engaged by the JMB to provide its opinion on the correct apportionment of income and expenses for Menara 1MK. The BRM in its report ('BRM report') suggested two options to be adopted and they were entitled Method A and Method B. At the first annual general meeting of the MC, the proprietors passed and adopted Ordinary Resolution 4 under Agenda 5 to use Method B as the basis to levy and collect maintenance charges. The methodology adopted in Method B subdivided the common property into further two parts, 'exclusive common property' and 'shared common property'. The costs of maintaining the exclusive common property would be borne by each component party whilst the shared common property would be apportioned and adjusted to only the three components of the project. The issues for consideration were: (i) whether

A the first defendant had the power to apply different unit rates to calculate and to impose charges concerning the maintenance charges and sinking fund contributions on the parcel owners; and (ii) whether the first defendant had the power, under the relevant laws, to transfer its funds to the three SMCs.

B **Held:**

(1) The MC was empowered to impose charges for the maintenance of the common property based on the following factors: (a) the proportion of the share units or provisional share units of the parcels or provisional
C blocks; and (b) the MC may determine different rates of charges for the parcels if they were used for significantly different purposes. Section 60(3) of the Act indicated that the MC had powers to differentiate the different type of charges to be imposed on proprietors subjected to the condition that the said power must not exceed the two limitations above.
D The BRM report and Method B contained a material error that rendered the charges to be unlawful and that the MC had acted outside the purview of its powers. The subdivision to allocate the costs of the exclusive common property to each component and share the costs of the shared common property was unlawful. The MC must strictly adhere to
E the requirements of s 60(3)(b) to be read together with ss 51, 52 and 59 of the Act. The MC did commit an error of law in imposing charges contrary to the express powers under s 60(3) of the Act (see paras 9–10, 13, 17 & 34).

F (2) The MC had the power to transfer or apportion the funds that relate to the SMCs to enable the entities to comply with their duties under the Act. The intention of the legislator indicated that the sums ought to be transferred or apportioned to the SMCs to enable the entity to maintain the limited common property. The MC at the very least had implied
G powers to transfer or apportion appropriate parts of the funds retained in the accounts to the SMCs, according to ss 40(1) and 95 of the Interpretation Acts 1948 and 1967. Otherwise, the intention of the legislator under s 60(2) (to be read together with ss 64(1)) and 66(2) of the Act would not be fulfilled or carried out (see paras 51–52 & 55).

H (3) The levy and collection of maintenance charges and sinking fund contributions by way of Method B in Ordinary Resolution 4 under Agenda No 5 at the first annual general meeting was null and void. All maintenance orders shall be levied and collected by the first defendant based on the consideration contained in s 60(3) of the Act (see para 57).

I **[Bahasa Malaysia summary**

Pertikaian dalam kes ini berpunca daripada pembangunan campuran yang dikenal sebagai 1 Mont Kiara Development ('pembangunan') yang terdiri daripada: (a) I-Zen Kiara II ('Kiara 2'); (b) Menara 1 MK; (c) Wisma Mont

Kiara ('Wisma Kiara'); dan (d) 1 Mont Kiara. Defendan pertama iaitu syarikat pengurusan ('MC') wujud di bawah s 56 Akta Pengurusan Strata 2013 ('Akta') dan tiga anak syarikat pengurusan yang berasingan ('SMC') ditubuhkan menurut s 17A Akta Hakmilik Strata 1985. Tiga SMC tersebut adalah Izen Kiara 2 SMC, Menara 1MK SMC dan 1 Mont Kiara dan Wisma Mont Kiara SMC. Oleh kerana terdapat pertikaian mengenai jumlah caj penyelenggaraan dan jumlah dana terikat yang dikenakan ke atas pemilik Wisma Mont Kiara dan 1 Mont Kiara, yang sebelumnya dikenakan oleh pemaju, Ireka Land Sdn Bhd, badan pengurusan bersama ketika itu ('JMB'), pendahulu MC, telah mengekalkan perkhidmatan Burgess Rawson Management Sdn Bhd ('BRM'). BRM ditugaskan oleh JMB untuk memberikan pendapatnya mengenai pembahagian pendapatan dan perbelanjaan yang betul untuk Menara 1MK. BRM dalam laporannya ('laporan BRM') mencadangkan dua pilihan untuk diguna pakai dan diberi tajuk Kaedah A dan Kaedah B. Pada mesyuarat agung tahunan pertama MC, pemiliknya meluluskan dan mengguna pakai Resolusi Biasa 4 di bawah Agenda 5 untuk menggunakan Kaedah B sebagai asas untuk memungut dan mengumpul caj penyelenggaraan. Metodologi yang digunakan dalam Kaedah B membahagikan harta bersama menjadi dua bahagian lagi, 'harta bersama eksklusif' dan 'harta bersama umum'. Kos penyelenggaraan harta bersama eksklusif akan ditanggung oleh setiap pihak komponen sementara harta bersama umum akan dibahagi dan disesuaikan hanya dengan tiga komponen projek. Isu-isu untuk pertimbangan adalah: (i) sama ada defendan pertama memiliki kuasa untuk mengguna pakai kadar unit berlainan untuk menghitung dan untuk mengenakan caj mengenai caj penyelenggaraan dan sumbangan dana terikat kepada pemilik petak; dan (ii) sama ada defendan pertama mempunyai kuasa, berdasarkan undang-undang yang relevan, untuk memindahkan dana kepada tiga SMC tersebut.

Diputuskan:

(1) MC diberi kuasa untuk mengenakan caj untuk penyelenggaraan harta bersama berdasarkan faktor-faktor berikut: (a) bahagian unit saham atau unit saham sementara petak atau blok sementara; dan (b) MC boleh menentukan kadar caj yang berbeza untuk petak tersebut jika ia digunakan untuk tujuan yang berbeza. Seksyen 60(3) Akta menunjukkan bahawa MC memiliki kuasa untuk membezakan berbagai jenis caj yang akan dikenakan kepada pemilik tertakluk kepada kuasa tersebut tidak boleh melebihi dua batasan di atas. Laporan BRM dan Kaedah B mengandungi kesalahan material yang menjadikan caj tersebut salah dan bahawa MC telah bertindak di luar bidang kuasa. Bahagian untuk memperuntukkan kos harta bersama eksklusif untuk setiap komponen dan berkongsi kos harta bersama umum adalah tidak sah. MC mesti mematuhi syarat-syarat s 60(3)(b) untuk dibaca bersama dengan ss 51, 52 dan 59 Akta. MC melakukan kesalahan undang-undang dalam mengenakan caj yang bertentangan dengan kuasa

yang dinyatakan di bawah s 60(3) Akta (lihat perenggan 9–10, 13, 17 & 34).

(2) MC memiliki kuasa untuk memindahkan atau membahagikan dana yang berkaitan dengan SMC untuk membolehkan entiti mematuhi tugas mereka di bawah Akta. Niat penggubal undang-undang menunjukkan bahawa jumlah tersebut harus dipindahkan atau dibahagikan kepada SMC untuk membolehkan entiti tersebut untuk menyelenggara harta bersama yang terhad. MC sekurang-kurangnya mempunyai kuasa tersirat untuk memindahkan atau membahagikan bahagian yang sesuai daripada dana yang disimpan dalam akaun kepada SMC, menurut ss 40(1) dan 95 Akta Tafsiran 1948 dan 1967. Jika tidak, niat penggubal undang-undang di bawah s 60(2) (dibaca bersama dengan ss 64 (1)) dan 66(2) Akta tidak akan dipenuhi atau dilaksanakan (lihat perenggan 51–52 & 55).

(3) Pungutan dan pengumpulan caj penyelenggaraan dan sumbangan dana terikat melalui Kaedah B dalam Resolusi Biasa 4 di bawah Agenda No 5 pada mesyuarat agung tahunan pertama adalah batal dan tidak sah. Semua arahan penyelenggaraan harus dipungut dan dikumpulkan oleh defendan pertama berdasarkan pertimbangan yang terkandung dalam s 60(3) Akta (lihat perenggan 57).]

Cases referred to

Attorney-General v HRH Prince Ernest Augustus of Hanover [1957] 1 All ER 49, HL (refd)

Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2021] 3 MLJ 466; [2021] 1 LNS 249, FC (folld)

Davies v Davies (1919) 26 CLR 348, HC (refd)

Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under the Strata Titles Act 1985) [2018] 4 MLJ 284, CA (folld)

Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia [1981] 2 MLJ 196, FC (refd)

Lai Ah Fatt v Timbalan Menteri Dalam Negeri, Malaysia & Anor [1990] 2 MLJ 312; [1990] 1 LNS 3, HC (refd)

Maritime Electric Co Ltd v General Dairies Ltd [1937] AC 610, PC (refd)

Muhamad Nazri bin Muhamad v JMB Menara Rajawali & Anor [2020] 3 MLJ 645, CA (folld)

Nabors Drilling (Labuan) Corp v Lembaga Perkhidmatan Kewangan Labuan [2020] 12 MLJ 54; [2020] 10 CLJ 732, FC (refd)

Perbadanan Pengurusan 3 Two Square v 3 Two Square Sdn Bhd & Anor and another appeal [2019] MLJU 1983, CA (folld)

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar [2020] 1 MLJ 141; [2020] 1 CLJ 1, FC (refd)

Sungei Wang Plaza Management Corp v Leong Soo Nyean [2019] MLJU 158, CA (refd)
Tan Boon Aun v Timbalan Menteri Dalam Negeri, Malaysia & Anor [1991] 2 MLJ 55; [1990] 1 LNS 114, HC (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 ss 40(1), 95
Public Utilities Act [CN]
Rules of Court 2012 O 18 r 19
Strata Management Act 2013 ss 9(2)(a), (2)(b), 10(4), 12(1), 15, 16, 21(1)(b), 23(3), 25(1), 27, 28, 28(1), 50, 50(1), (2), (3), 51, 51(1), (2), 52, 55, 56, 59, 60, 60(2), (3), (3)(b), (4), 61, 61(2), 62, 64(1), (2), 65, 66(1), (2), 67(1), 69, Part V, Chapter III, First Schedule, item 2
Strata Titles (Federal Territory of Kuala Lumpur) Rules 2015 (revoked by Strata Titles (Federal Territory of Kuala Lumpur) Rules 2019) Schedule IV, r 8(1)
Strata Titles Act 1985 s 17A

Lim Chee Wee (Muayyad Khairulmaini with him) (Lim Chee Wee Partnership) for the plaintiffs.
Dahlia Lee (Lee Wooi Mien with her) (Law Chamber of Dahlia Lee & Co) for the defendants.

Mohd Arief JC:

[1] This case concerns the application of the Strata Management Act 2013 (Act 757) and the Strata Titles Act 1985 (Act 318).

MATERIAL FACTS

[2] The material facts are as follows:

(a) the dispute arises out of the mixed development known as 1 Mont Kiara Development ('the development') that was constructed on a single lot known as Lot 60493 and held under Geran 70251, Mukim Batu, Daerah Kuala Lumpur ('Lot 60493');

(b) the development is made of a: (i) I-Zen Kiara II ('Kiara 2'), a 33-storey serviced apartment block containing residential parcels and commercial parcels; (ii) Menara 1 MK ('Menara 1 MK'), a 34-storey high office block containing premier office suites and office suites; (iii) Wisma Mont Kiara ('Wisma Kiara'), a 19-storey office block; and (iv) 1 Mont Kiara, a four-storey retail mall and all basement and upper-level carparks;

(c) the management corporation, the first defendant, came into being on 5 December 2015 under s 56 of the Strata Management Act 2013. The

duty of the management corporation ('MC') was, among others, to manage and maintain the subdivided building or land and the common property and keep it in a state of good and serviceable repair (see s 59 of the Strata Management Act 2013);

(d) separate subsidiary management corporation ('SMC') was set up on 9 April 2019 following s 17A of the Strata Titles Act 1985 to take over the management and control of the limited common properties under the purview of each SMC;

(e) the three SMCs are as follows:

(i) Izen Kiara 2 SMC;

(ii) Menara 1MK SMC; and

(iii) 1 Mont Kiara and Wisma Mont Kiara SMC.

This court notes that these three SMCs are not parties to this proceeding.

(f) because of a dispute as to the amount of maintenance charges and the sinking fund sums chargeable on the proprietors of Wisma Mont Kiara and 1 Mont Kiara, that was earlier imposed by the Developer, Ireka Land Sdn Bhd, the then joint management body ('JMB'), the predecessor to MC, had retained the services of Burgess Rawson Management Sdn Bhd ('BRM');

(g) BRM was engaged by the JMB to provide its opinion on the correct apportionment of income and expenses for Menara 1MK;

(h) BRM issued its report on 30 January 2015 which can be seen in exh KY1 in the plaintiff's affidavit in support ('BRM Report');

(i) the BRM report suggested two options be adopted. They are entitled Method A and Method B as seen on pp 109 –110 and at Schedules 2 and 3 of the aforesaid report;

(j) on 5 December 2015, the developer convened the first annual general meeting of the MC. At the aforesaid meeting, the proprietors passed and adopted the Ordinary Resolution 4 under Agenda 5 to use Method B as the basis to levy and collect maintenance charges as set out in Table 1 under item 6.5 of the minutes of the first AGM;

(k) method B is provided in Schedule B of the BRM report, and the detailed explanation could be found in paras 6.2, 8.1, 8.2, 8.3 and 8.4. For our purposes, it is important to note para 8.3 of the BRM report, which explains the finding on what they found to be 'significantly different purposes' and the suggested charges in para 8.4 of the said document; and

(l) as stated earlier, the charges that were adopted are based on the opinions contained in paras 8.1 to 8.4 of the BRM report.

QUESTIONS TO BE ANSWERED BY THIS COURT

[3] The High Court had earlier struck out the originating summons under O 18 r 19 of the Rules of Court on 10 May 2019. The plaintiff dissatisfied with the said order appealed to the Court of Appeal.

[4] The plaintiff's appeal was partly allowed by the Court of Appeal as seen in the order dated 2 December 2020. The Court of Appeal however limited the issues to be decided by this court to the following questions:

(a) whether the first defendant has the power to apply different unit rates to calculate and to impose charges concerning the maintenance charges and sinking fund contributions on the parcel owners; and

(b) whether the first defendant has the power, under the relevant laws, to transfer its funds to the three subsidiary management corporations.

[5] I have had the benefit of reading the submissions of both parties and having heard parties on 20 April 2021. Both counsels have greatly assisted court in deciding on these two issues and I hereby thank both. My decision on the aforesaid questions is stated in the following paragraphs.

QUESTION 1 — WHETHER THE FIRST DEFENDANT HAS THE POWER TO APPLY DIFFERENT UNIT RATES TO CALCULATE AND TO IMPOSE CHARGES IN RELATION TO THE MAINTENANCE CHARGES AND SINKING FUND CONTRIBUTIONS ON THE PARCEL OWNERS

[6] There are two parts to the question referred to above. The first part concerns whether the first defendant ie, the MC has the power to apply different unit rates to calculate and to impose charges. The second, although not clearly spelt out, is whether the first defendant had acted contrary to the powers under the Strata Management Act 2013 or under the Strata Titles Act 1985.

[7] I agree with the plaintiff that a body corporate created by statute may only exercise the powers conferred on it by statute. One could see this position being proclaimed in the plethora of cases referred by the plaintiffs in their written submissions (please refer to among others *Muhamad Nazri bin Muhamad v JMB Menara Rajawali & Anor* [2020] 3 MLJ 645 and *Sungei Wang Plaza Management Corp v Leong Soo Nyean* [2019] MLJU 158) This will depend on the exact powers that appear in the legislation, but one cannot forget

A the implied powers that are afforded by law as seen in ss 40(1) and 95 of the Interpretation Acts 1948 and 1967.

[8] Here, the power of the MC to impose charges for maintenance and sinking fund on proprietors appear in ss 50, 51, 52, 60, 61 and 62 of the Strata Management Act 2013. The important provisions are laid down in s 60(3) of the aforesaid Act which is reproduced below:

> 60(1) If the maintenance account in the name of the management corporation had not been earlier established under subsection 50(1), the management corporation shall open and maintain a maintenance account in the name of the management corporation, with a bank or financial institution.
>
> (2) The maintenance account shall consist of all moneys specified in subsection 50(2), and all moneys in the maintenance account shall be used for the purposes specified in subsection 50(3).
>
> (3) Subject to section 52, for the purpose of establishing and maintaining the maintenance account, the management corporation may at a general meeting:
>
> (a) determine from time to time the amount to be raised for the purposes mentioned in subsection 50(3);
>
> (b) raise the amounts so determined by *imposing Charges on the proprietors in proportion to the share units orprovisional share* units of their respective parcels or provisional blocks, *and the management corporation may determine different rates of Charges to be paid in respect of parcels which are used for significantly different purposes* and in respect of the provisional blocks;

[9] The MC is empowered to impose charges for the maintenance of the common property based on the following factors:

(a) *the proportion of the share units* or provisional share units *of the parcels* or provisional blocks; and

(b) the MC may determine different rates of charges for the parcels *if they are used for significantly different purposes*.

[10] Based on the plain reading of s 60(3) of the Strata Management Act 2013, I am of the view that the said provision indicate that the MC has powers to differentiate the different type of charges to be imposed on proprietors subject to the condition that the said power must not exceed the two limitations above. The said charges must be proportional to the share units of each parcel and if any different rates are to be applied it must be shown that these parcels are used for significantly different purposes.

[11] The limitation is for obvious reasons. The maintenance charges and the sinking fund paid by the proprietors are paid following ss 50(2) and 51(1) of

the Strata Management Act. These sums cannot be used for any other purpose other than those stated in ss 50(3) and 51(1) of the said Act. The purpose for the collection of these sums is for the purposes of maintaining and ensuring that the capital expenditure required to upkeep the common property shared by all proprietors. As such, the proprietor of each parcel will be required to provide payment of their share based on the size of their units and other characteristics as laid down in s 8 and the First Schedule of the earlier referred Act. Note that the First Schedule is parimateria with Schedule IV of sub-r 8(1) of the Strata Titles (Federal Territory of Kuala Lumpur) Rules 2015.

[12] The MC at the meeting on 5 December 2015 chose to adopt Method B as proposed in the BRM report. This was then put to the vote at the aforesaid meeting and was approved. This was made under s 60(4) of the Strata Management Act.

[13] However, after reviewing the BRM Report and Method B as adopted by the MC, I find that it contains a material error that renders the charges to be unlawful and that the MC had acted outside the purview of its powers. The BRM report states:

> The operating budget in Method B is attached as Schedule 3 where the costs of the maintenance and management of the Exclusive Common Property for a component party will be borne by the component party whilst the costs of management and maintenance of the Shared Common Property will be apportioned by adjusted survey areas to each component party of 1 Mont Kiara, Wisma Mont Kiara, Premiers Suites of Menara 1MK and Office Suites of Menara 1MK.

[14] The methodology adopted in Method B subdivide the common property into further two parts. The first being what BRM refers to as 'Exclusive Common Property' and the second being the 'Shared Common Property'. The costs of maintaining the 'Exclusive Common Property' will be borne by each component party whilst the 'Shared Common Property' will be apportioned and adjusted to only the three components of the project ie *1 Mont Kiara, Wisma Mont Kiara, Premiers Suites of Menara 1MK and Office Suites of Menara 1MK.*

[15] This subdivision of the common property to that of 'Exclusive Common Property' and 'Shared Common Property' is not provided under the Strata Management Act. The Act only refers to 'Common Property', which is defined as follows:

> 'Common Property'
>
> (a) In relation to a building or land intended for sub-division into parcels, means so much of the development area —

A (i) As is not comprised in any parcel or proposed parcel; and

(ii) Used or capable of being used or enjoyed by occupiers of two or more parcels or proposed parcels.

B **[16]** The proprietors are required to pay the charges and contribution into the common fund to the MC for the maintenance and management of the common property. It is also the duty of the MC to collect charges and contribution from the proprietors for the maintenance of the common property. These are provided under ss 50, 51, 52 and 59 of the Strata C Management Act.

[17] This subdivision to allocate the costs of the 'Exclusive Common Property' to each component and share the costs of the 'Shared Common Property' is unlawful. The charges must be imposed on the requirements laid D down under s 60(3) of the said Act. The charges must be raised on the 'proprietors in proportion to the share units or provisional share units of their respective parcels'. Therefore, the subdivision of the common property into 'Shared Common Property' and 'Exclusive Common Property' to allocate the share of the maintenance of such 'Common Property' is unlawful. The E MCmust strictlyadhere to the requirements of s 60(3)(b) to be read together with ss 51, 52 and 59 of the Strata Management Act.

[18] I also note that Method B adopted by the MC renders the proprietors of F the units in Izen Kiara 2 to be exempt from paying any form of charges for the common property. As stated by the plaintiffs, no reason was given why the proprietors of these units were excluded despite the clear requirement of the Statutory Management Act.

G **[19]** I refer and rely on the judgment of the Court of Appeal in *Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under the Strata Titles Act 1985)* [2018] 4 MLJ 284 and in *Muhamad Nazri bin Muhamad v JMB Menara Rajawali & Anor* [2020] 3 MLJ 645. Although the facts of the said cases are slightly different to that of this case, I adopt the reasoning of the Court of H Appeal in those cases concerning the powers of a statutory body. I quote the decision of Tengku Maimun JCA (as Her Ladyship then was) in *Rajawali*:

> It is clear, particularly by reference to s 36(c) of the STA, that there is an express statutory provision on how the maintenance charges should be calculated. It is the share unit that should form the basis of the proportion payable by the defendant of I the maintenance charges. The levy based on the area or square foot is not provided for under the STA.

[20] I also refer to the decision of the Federal Court in *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196 a decision of Raja Azlan

Shah CJ (Malaya) (as his Royal Highness then was): A

> The University was incorporated under Act 30 of 1971. It is a corporate body, and as such, it can only do such acts as are authorised directly or indirectly by the statute creating it: see *Attorney-General v Leeds Corporation* [1929] 2 Ch 291. In *Public Textiles Bhd v Lembaga Letrik Negara* [1976] 1 LNS 120 *Lembaga Letrik Negara* [1976] 2 MLJ 58 *this court said in relation to a corporation that whatever is not permitted expressly or by necessary implication by the incorporating statute is prohibited not by the express or implied prohibition of the Legislature but by the principle of ultra vires. Therefore the university authority can only act in pursuance of the powers given to it by law*. It follows that it has to follow proper procedure as prescribed by law before condemning an erring member of the staff. If it goes outside its limit of operation, or is not warranted by it, then any decision made by it is ultra vires. B C

[21] I am further guided by the decision of the Court of Appeal in *Perbadanan Pengurusan 3 Two Square v 3 Two Square Sdn Bhd & Anor and another appeal* [2019] MLJU 1983, a decision of the Court of Appeal. Vazeer Alam JCA stated: D

> [30] On the first point, we find that the definition of 'common property' in s 4 of the STA defines it by exclusion, that is, common property is simply that which is not comprised in any parcel (including any accessory parcel), or any provisional block as shown in an approved strata plan. Hence, under s 4 of the STA, by exclusion, all those areas not comprised in or demarcated as parcels would be common property. Thus, we agree that the central cooling tower, lifts and public toilets in Crest Tower, which do not form part of the strata parcels or any accessory parcel are common property. The fact that these areas are not demarcated as common property in the strata plan does not mean that they are not common property. After all any demarcation on the strata plan would have been done by the plaintiff as the developer of 3 Two Square. E F
>
> [31] *And on the exclusive use argument, we agree with the findings of the learned High Court judge that even though the utility of these facilities accrue substantially (even if not exclusively) to the occupiers of Crest Tower, the cost of maintenance of such facilities cannot be left to the plaintiff as strata parcel owners in that tower block. As these areas are common property, it would be the obligation of the Management Corporation to maintain such property as set out in section 43(1)(a) of the STA, which provides as follows:* G
>
> > (1) The duties of the management corporation include the following: H
> >
> > (a) to manage and properly maintain the common property and keep it in a state of good and serviceable repair;
>
> [32] The issue of whether an area in a strata development is common property cannot be construed by reference to its mere utility of these areas/facilities to certain parcel owners. Nowhere is the concept of exclusive or special use provided for in the STA. *Maintenance charges imposed on the parcel owners by the Management Corporation is for the maintenance and management of all the common areas in the strata development.* Crest Tower is part and parcel of the 3 Two Square, and it so happens that the plaintiff owns all the strata units in Crest Tower, but that does not I

mean that the plaintiff as proprietor of all strata parcel units in Crest Tower has to manage and maintain the cooling tower, lifts and public toilets in Crest Tower or for that matter any other common property in that tower block.

[22] I note the position argued by the defendants' counsel that relies on paras 6.2, 8.1, 8.2 and 8.3 of the BRM report which was referred to as Method B that was eventually adopted by the MC at the earlier referred meeting. This argument is persuasive on its face value as the report seems to indicate that Schedule IV of sub-r 8(1) of the Strata Titles (Federal Territory of Kuala Lumpur) was considered by BRM.

[23] However, as I said in paras 12–20 earlier, this argument is wrong. The MC is not empowered to sub categorise the common property. If it wishes to do so, to ensure that each common property is maintained by those who utilise them, then this can only be undertaken by incorporating a subsidiary management corporation under s 17A of the Strata Titles Act. Unfortunately, this was not undertaken at the time of the meeting and the adoption of Method B by the MC.

[24] Alternatively, the defendants also argue that the MC have the power to vary or differentiate the charges based on the powers provided under s 60(3) which allows for the differentiation based on the 'significantly different purposes' for each unit. It was further argued that the category for each unit is provided for in the First Schedule of the Act which allows for differentiation between 'Apartment/Small Office/Home Office, Office, College, Retail Complex, Hotel/Medical Complex, Car Park, Shop Houses, etc'.

[25] Again, on the face of the BRM Report, this is also persuasive but fails in the application of the details. The decision of the MC to impose any form of charges must abide by the requirements of s 60(3) of the said Act. Having analysed the legislation, the First Schedule provides the mechanism as to how the allocated share units are to be calculated. The factors identified by defendants' counsel are merely factors that go to the weightage in the formula as provided in item 2 of the First Schedule. They do not go into the factors that should be considered by MC for the purposes of s 60(3) of the Strata Management Act if it intends to differentiate the charges based on the 'different purposes' of each parcel. Therefore, with respect to counsel, I disagree with both arguments as I find that they are both erroneous in the application of the law. I reiterate that the subdivision of the common property and the allocation of charges based on this subdivision at that juncture is incorrect and unlawful.

[26] Lest I am accused of having failed to consider the other issues raised by the defendants, I will explain in the following paragraphs why I do not agree with those arguments.

[27] The first alternative argument put forward by the defendants concerning the alleged meeting held on 4 May 2019 which eventually changed the charges imposed by the MC. The defendants argue that as a result of these changes, the illegality of the charges challenged by the plaintiffs now becomes either academic or is regularised by these amended charges. The second alternative argument lies on the issue of estoppel. The defendants contends that as Mr Kwok Yoke How, the representative/director of the first plaintiff, had attended the meeting which adopted Method B, the plaintiffs is not entitled to challenge the validity of the charges.

[28] I am of the opinion that these arguments do not answer the illegality of these charges. The MC is only entitled to impose charges based on the powers provided under the Statutory provisions laid down earlier. The fact that the new charges have since reverted to what appears to be the correct formulation under the Strata Management Act does not justify the previous charges that were wrongly adopted by the MC. Neither could the defendants rely on the doctrine of estoppel to regularise any form of illegality. Especially, when one considers that the Statutory Management Act Management Act and the Strata Titles Act are social legislation intended to protect a class of property owners and to regularise and ensure the 'proper maintenance and management of buildings and common property'. As stated by Higgins J in *Davies v Davies* (1919) 26 CLR 348 at p 362, 'anyone is at liberty to renounce a right conferred by law for his own benefit, but he cannot renounce a right conferred for the benefit of society'.

[29] I also refer to the decision of the Privy Council in *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610, concerning the validity of charges issued by the electric company and whether the decision of the Canadian Supreme Court which relied on the doctrine of estoppel to justify the imposition of charges at different rates to that laid down under the Public Utilities Act of New Brunswick. The Privy Council reversed the finding of the Supreme Court of Canada and held that all public utility companies were required to charge the set rates, no more and no less. Lord Maugham stated '[Estoppel] cannot, therefore, avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. *The duty of each party is to obey the law'*.

[30] Therefore, I find that the above arguments do not justify the previous charges as they remain to be invalid under the law.

[31] To ensure that I answer the questions completely, I make the following observations on the powers of the MC under s 60(3) of the Strata Management

Act. Sufficient powers are reposed with the MC to impose charges where they find parcels should attract different rates due to 'significant different purposes' of the units. The differences must however be justified and must not be arbitrary. There must be actual differences in the purposes of usage of the parcels.

[32] The difference is not restricted to be merely between what is commonly referred to as either 'commercial' or 'retail' or 'residential' use. That is not the criteria that are specifically stated in s 60(3) of the Strata Management Act. What must be shown is that use of the parcels are significantly different to those of other parcels. Given those differences, the rates of charges may be different but must still be reasonable and not arbitrary. Therefore, this will depend on the facts of each case. However, as stated above, in this case, the way the charges were classified, and the subdivision of the common property, at the time when the SMCs were not in place, is unlawful and contrary to the Strata Management Act and the Strata Titles Act.

[33] For the reasons stated above, I answer the question in the affirmative. The MC, according to s 60(3), has adequate powers to impose different rates of charges subject to the requirement that this must be based on the 'significantly different purposes' test laid down under the Act. This will depend on the facts of each case.

[34] Despite answering this question affirmatively, I find that the MC did commit an error of law in imposing charges contrary to the express powers unders 60(3) of the Strata Management Act.

QUESTION 2 — WHETHER THE FIRST DEFENDANT HAS THE POWER, UNDER THE RELEVANT LAWS, TO TRANSFER ITS FUNDS TO THE THREE SUBSIDIARY MANAGEMENT CORPORATIONS

[35] The second question concerns the alleged decision of the MC's to transfer a sum amounting to RM5,200,023.58 being the surplus funds on the 1 December 2018 at the Fourth AGM and that on the 4 May 2019 meeting of the MC it was decided to 'apportion the sums from the MCs to the SMCs' which led to the transfer of the alleged further sum of RM7,7376,604.91 to the SMCs.

[36] This decision is challenged by the plaintiffs because they say such a decision is illegal and unlawful. The plaintiffs contends that the said sums cannot be paid to the SMCs and should be retained by the MC as there is no statutory power on the MC to transfer any sums to the SMCs. Therefore, the plaintiff's contends that the resolutions passed on 1 December 2018 and 4 May

2019 were void and ultra vires of the powers of the MC under the Strata Management Act as well for a refund of the monies allegedly paid without authority in law.

[37] The plaintiffs also argue that SMCs should not have access to the funds that were retained by the MC before they were created. They argue that the cumulative effect of the Strata Management Act renders each SMC a separate entity under the law and therefore must pay for and maintain the LCP from funds received from the proprietors after the SMCs were created. The plaintiffs refers to ss 15, 16, 27, 28 and 55 of the Strata Management Act in support of this argument as well as the cases I cited earlier.

[38] It is the task of this court to determine whether such power exists and whether the MC was correct in 'apportioning' the sums to the SMCs. To determine this, I am reminded of the judgment of the House of Lords in *Attorney-General v HRH Prince Ernest Augustus of Hanover* [1957] 1 All ER 49 where the following principles of statutory interpretation were stated:

Viscound Simonds:

> It means only that the elementary rule must be observed that *no one should profess to understand any part of a statute or of any other document before he had read the whole of it*. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.

Lord Normand:

> *In order to discover the intention of Parliament it is proper that the court should read the whole Act, inform itself of the legal context of the Act, including Acts so related to it that they may throw light upon its meaning, and of the factual context, such as the mischief to be remedied, and those circumstances which Parliament had in view*, including in this case the death of the last of Queen Anne's children and the state of the family of the Princess Sophia. It is the merest commonplace to say that words abstracted from context may be meaningless or misleading.

Lord Somervell:

> The key to the opening of every law is the reason and the spirit of the law — it is the 'animus imponentis' the intention of the lawmaker. However to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute: it is to be viewed in connection with the whole context ...
>
> When a court comes to the Act itself, bearing in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole or any part of the Act may be referred to and relied on.

Malaysian judges have also adopted this principle as seen in *Tan Boon Aun v Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1991] 2 MLJ 55; [1990] 1 LNS 114, *Lai Ah Fatt v Timbalan Menteri Dalam Negeri, Malaysia &*

A *Anor* [1990] 2 MLJ 312; [1990] 1 LNS 3 and the judgment of the Federal Court in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141; [2020] 1 CLJ 1.

B **[39]** I am of the view that the MC have powers under the Strata Management Act to transfer or apportion the sums paid by the proprietors to the SMCs to ensure that the 'Limited Common Properties' are maintained following the requirements of the Strata Management Act.

C **[40]** The funds retained by the MC in the maintenance account and the sinking fund account are funds paid by proprietors of the units to ensure that the buildings and lands are maintained and are properly kept for the benefit of all owners. These sums are first collected by the developer under s 9(2)(a) and (b) from the parcel owners and are to be retained on trust for the purchasers following s 10(4) of the Strata Management Act. The purchasers are under a legal duty to pay the charges and contribution to the sinking fund as required under s 12(1) of the said Act.

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[41] These funds are then transferred to the joint management body ('JMB') under s 15 of the Strata Management Act and if not transferred is deemed by law to be vested with the JMB under s 16. It is important to note that the funds retained in these accounts can only be used by the JMB for the purposes laid down under ss 21(1)(b) and 23(3) of the Strata Management Act. Again, the purchasers are under a duty to pay the charges and contribution to the sinking fund account to the JMB to ensure that the buildings and lands intended for subdivision into parcels and common property are maintained as provided in s 25(1) of the said Act.

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[42] Upon the setting up of the MC, these funds are then transferred to or are vested with the said corporation according to ss 27 or 28(1) and are to be retained in the said accounts under ss 60(2) and 61(2) of the Strata Management Act. The sums paid into either the maintenance account or under the sinking fund account must be only used for purposes laid down in ss 50(3) and 51(2) of the Strata Management Act. The duty on the proprietors to pay the charges and contributions is provided under s 52 of the same Act.

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[43] What could be seen in the aforesaid referred provisions of the Strata Management Act is that the legislature intended that the sums paid by the purchasers to either the maintenance account or the sinking fund are to be utilised only for the specific purposes spelt out under the legislation. The legislature intended that these sums ought to be protected from the time the accounts were set up by the developer to the JMB and eventually to the MC. These sums are only to be used to maintain and upkeep the lands, buildings and common property either by the developer, JMB or MC or SMCs or for any

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other purpose expressly provided under the Act. These sums are also paid by all the proprietors, including those who will now fall under the purview of the SMCs, to ensure that the lands, buildings and common property are maintained under the statutory requirements.

[44] The MC is also under a duty to, among others:

(a) maintain and manage the subdivided building or land and the common property and keep it in a state of good and serviceable repair; and

(b) to do such other thing as may be expedient or necessary for the proper maintenance and management of the subdivided buildings or lands and the common property.

[45] I also note that the MC has powers, inter alia:

(a) to collect the charges from the proprietors in proportion to the share units or provisional share units of their respective parcels or provisional blocks; and

(b) to do all things reasonably necessary for the performance of its duties under this Act for the enforcement of the by-laws.

Please refer to s 59 of the Strata Management Act.

[46] It is also important to note that the duty of the MC to maintain the common property is reduced when the SMCs are created under s 17A of the Strata Titles Act. As seen in s 64(2) of the Strata Management Act, once an SMC is established, the MC only retains its powers and duties in matters concerning the common property which is not designated as limited common property. The limited common property shall only be maintained by the SMC and not be the MC.

[47] Upon the setting up of the SMC, the new entity is required to open and maintain a maintenance account with a bank or financial institution and a sinking fund account under ss 66(1) and 67(1) of the Strata Management Act. Section 66(2) of the Act also states that maintenance account held by the SMC shall also consist 'of the moneys specified in subsection 50(2) and may be used only for the purposes specified in subsection 50(3)'. This shows that the monies that were originally maintained by the developer in the maintenance account in the name of the MC under s 50(1) are included as part of the monies to be paid into the SMCs maintenance account.

[48] I also note that the SMC also have similar powers and duties to those of the MC as contained in Chapter III of Part V of the legislation concerning the limited common property, subject to adequate modifications, as provided

under s 64(1) of the Strata Management Act. This includes express powers granted to the MC regarding the maintenance account under s 60 of the said Act. Section 69 on the other hand provide that any judgment entered against the MC that relates solely to the limited common property, the said judgment shall be against only the proprietors of those parcels and shall be calculated as if they were expenses of the SMC under s 65 of the same Act.

[49] Having considered the legislation as a whole, I find that Parliament intendedthat once the SMC is created, the funds that were earlier paid by the proprietors that are covered by the MC should be paid to the new entity, the SMC, and utilised for the maintenance of the limited common property. Otherwise, the legislator would not have indicated that the sums of monies paid by the proprietors into the maintenance account to the MC be part of the monies that constitute the maintenance account of the SMCs under ss 66(2) and 60 (to be read with s 64(1)) of the said Act. This intention also appears when one considers the fact that the MC no longer maintains or upkeep the limited common property and the proprietors would have earlier made contributions to the MC's maintenance accounts for this particular purpose.

[50] I am further guided by the decision of the Federal Court in *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2021] 3 MLJ 466; [2021] 1 LNS 249 where Nallini Pathmanathan FCJ stated:

> [47] This court had occasion to address this issue of the construction of social legislation recently in the case of *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60. That series of cases dealt with housing developers and housing purchasers under the Housing Development (Control and Licensing) Act 1966 ('the HDA 1966'), more particularly the mode of computation of liquidated and ascertained damages for late delivery. The Chief Justice, Tun Tengku Maimun bt Tuan Mat held, inter alia, as follows, in relation to social legislation:
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> > [31] All legislation is social in nature as they are made by a publicly elected body. That said, not all legisl ation is 'social legislation'. A social legislation is a legal term for a specific set of laws passed by the legislature for the purpose of regulating the relationship between a weaker class of persons and a stronger class of persons. Given that one side always has the upper hand against the other due to the inequality of bargaining power, the State is compelled to intervene to balance the scales of justice by providing certain statutory safeguards for that weaker class. A clear and analogous example is how this court interpreted the Industrial Relations Act 1967 in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 ('Hoh Kiang Ngan').
> >
> > ...
> >
> > [33] When it comes to interpreting social legislation, the State having statutorily

intervened, the Courts must give effect to the intention of Parliament and not the intention of parties. Otherwise, the attempt by the legislature to level the playing field by mitigating the inequality of bargaining power would be rendered nugatory and illusory.

The court went on to refer and cite with approval the dictum of Bhagwati J in *Workmen of Indian Standards Institution v Management of Indian Standards Institution* 1976 AIR 145, with which we agree and adopt, as follows:

[1] It is necessary to remember that the Industrial Disputes Act 1947 is a legislation intended to bring about peace and harmony between management and labour in an 'industry ' so that production does not suffer and at the same time, labour is not exploited and discontented and, therefore, the tests must be so applied as to give the widest possible conno tation to the term 'industry'. Whenever a question arises whether a particu lar concern is an 'industry', the approach must be broad and liberal and not rigid or doctrinaire. *We cannot forget that it is a social welfare legislation we are interpreting and we must place such an interpretation as would advance the object and purpose of legislation and give full meaning and effect to it in the achievement to (sic) its avowed social objective.* (Emphasis added.)

[49] This court then went on to summarise the principles on the interpretation of social legislation. Of relevance here is the pronouncement that:

(i) *Statutory interpretation usually begins with the literal rule. However, and without being too prescriptive, where the provision under construction is ambiguous, the Courts will determine the meaning of the provision by resorting to other methods of construction foremost of which is the purposive rule (see the judgment of this court in All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97).

(ii) *The literal rule is automatically displaced by the purposive rule when it concerns the interpretation of the protective language of social legislation.*

(iii) For the avoidance of doubt, it is important to emphasise that even where a term or provision of a social legislation or a statutory contract enacted thereunder is literally clear or unambiguous, the court no less shoulders the obligation to ensure that the said term or provision is *interpreted in a way which ensures maximum protection of the class in whose favour the social legislation was enacted*.

[51] Therefore, given the above, I am of the view that the MC has the power to transfer or apportion the funds that relate to the SMCs to enable the said entities to comply with their duties under the Strata Management Act. As referred to earlier, the MC has the requisite power to do 'all things reasonably necessary for the performance of its duties under this Act for the enforcement of the by-laws' and is under a duty to take all that is necessary 'to ensure the proper maintenance and management of the subdivided buildings or lands and the common property'. The intention of the legislator indicates that these sums ought to be transferred or apportioned to the SMCs to enable the said entity to maintain the limited common property. The MC should then undertake the

appropriate calculation to apportion the adequate amounts from the original maintenance account taking into account the correct share to be given to each SMCs based on the proportionate size of the parcels that are involved.

[52] Even if I am wrong on the above, I am of the view that the MC at the very least has implied powers to transfer or apportion appropriate parts of the funds retained in the accounts to the SMCs. I refer to ss 40(1) and 95 of the Interpretation Acts 1948 and 1967 which states that:

> Section 40(1)
>
> (1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.
>
> Section 95
>
> (1) Where a written law confers power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

[53] I further refer to the decision of the Federal Court in *Nabors Drilling (Labuan) Corp v Lembaga Perkhidmatan Kewangan Labuan* [2020] 12 MLJ 54; [2020] 10 CLJ 732. In that case, the applicant filed a judicial review to declare that a regulation issued by the Labuan Financial Services Authority is unlawful because the main legislation did not contain any express powers for the authority to create such subsidiary legislation. It was alsoargued that as the main legislation had revoked the previous requirements of having to obtain the approvals from the authority, to reintroduce such duty through subsidiary legislation would be repugnant to the Main Act.

[54] The Federal Court dismissed the appeal and held that the authority had implied powers under the legislation to fulfil its duties. Rhodzariah Bujang FCJ delivering the judgment of the Federal Court stated:

> [21] Given such wide powers of the respondent and in view of s 40 read with s 95 of the Interpretation Acts 1948 and 1967, it has the implied power to enforce it by, inter alia, making a subsidiary legislation and to impose conditions when granting a licence or giving its approval. The guidelines made under the Regulations to facilitate the exercise of the said power, again was rightly held by the learned HCJ and the Court of Appeal to have the force of law and as held in their respective judgments, the Regulations is not ultra vires s 7(6) of the Act. That is the very same view that we adopt here. The question of law posed is therefore answered in the negative and consequentially, the appeal is dismissed with cost.

[55] Therefore, similarly, the MC has implied powers according to ss 40 and 95 of the Interpretation Act to transfer the funds from the original

maintenance account which was originally held by the MC under ss 50(2) to be transferred or apportioned to the SMC. Otherwise, the intention of the legislator under s 60(2) (to be read together with ss 64(1)) and 66(2) of the Act will not be fulfilled or carried out.

[56] Given the above, I answer the second question posed by the Court of Appeal in the positive. Therefore, I dismiss the remedies prayed for by the plaintiffs that relate to the above referred second question.

DECISION ON THE AMENDED ORIGINATING SUMMONS — ENCLOSURE 9

[57] Based on the above grounds i hereby make the following orders concerning the amended originating summons filed by the plaintiffs dated 2 April 2019:

(a) a declaration that they levy and collection of maintenance charges and sinking fund contributions by way of 'Method B' in Ordinary Resolution 4 under Agenda No 5 at the first Annual General Meeting is null and void and for an order that all maintenance charges shall be levied and collected by the first defendant based on the consideration contained in s 60(3) of the Strata Management Act as from 1 January 2016;

(b) the plaintiff's other prayers in the originating summons are dismissed;

(c) parties are at liberty to apply; and

(d) no order as to costs.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh